Supreme Court, U.S.
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No. 96-1688

In The

Supreme Court of the United States

October Term, 1996

DAVID M. SCHLESSINGER,

Petitioner,

v.

GEORGE SALIMES, TOWN OF GENEVA, TOWN OF GENEVA BOARD, RICHARD PLOCH, Chairperson of the Board, RICHARD BEHOF, Member of the Board, KENNETH PIANTINO, Member of the Board, TOWN OF GENEVA POLICE DEPARTMENT, EDWARD GRITZNER, GEORGE CONDOS, ANTHONY'S STEAKHOUSE INC., Individually, Jointly, and Severally,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Introduction

In response to Respondents' Brief in Opposition, Petitioner reaffirms and incorporates the Petition for a Writ of Certiorari in its entirety. The Petition explains in detail how the facts of this case meet the tests required by case law to show that the police officer is outside the scope of qualified immunity. The District Court specifically stated in the Summary Judgment that Officer Salimes had seized Mr. Schlessinger within the meaning of Fourth Amendment seizure:

> Viewing the facts in a light most favorable to Mr. Schlessinger, a reasonable person could conclude that he was not free to leave; Officer Salimes had seized him.

Respondents now imply in their Brief in Opposition that the District Court's finding of seizure of Mr. Schlessinger within the meaning of the Fourth Amendment should be completely disregarded. Respondents further advocate the position that it is appropriate to completely disregard the Constitutional rights of Mr. Schlessinger by foregoing legal analysis on the issue of qualified immunity including the issue of Fourth Amendment seizure in the appeal decision. Clearly, the Constitutional rights of individuals were not created to disregard so easily as respondents suggest to this honorable Court.

De Novo Review Still Requires the Seventh Circuit to Stay Within Case Facts and Relevant Case Law

While the *de novo* standard of review does allow the Seventh Circuit to make entirely new conclusions of law, the Seventh Circuit is still within the confines of the case facts and relevant case law when making its conclusions of law. A qualified immunity claim must be reviewed in the light most favorable to plaintiff appealing the qualified immunity claim and according him the benefit of all reasonable inferences. *Simmons v. Pryor,* 26 F.3d 650, 653 (7th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1833, 128 L.Ed.2d 461 (1994). See the Petition for details concerning the various ways the Seventh Circuit used to give all the credibility and benefit to the defendants while giving no credibility and benefit to the plaintiff. *De novo* review does not give the Seventh Circuit the discretion to review this case in the light most favorable to defendants. Seventh Circuit is required to construe the case in the light most favorable to the Petitioner.

Additionally, in *Elder v. Halloway,* this Court held that appellate review of qualified immunity disposition is to be conducted in light of *all* relevant precedents, not simply those cited to or discovered by the district court. *Elder v. Halloway,* 510 U.S. 510, 511, 114 S.Ct. 1019 (1994) (emphasis added). *All* relevant precedents include *all* of the qualified immunity case law and the Fourth Amendment seizure case law cited in *Kernats v. O'Sullivan,* 35 F.3d 1171 (7th Cir. 1994). See the Petition of this case where the *required* tests are cited and the case facts are then applied to these tests. The case of *Kernats v. O'Sullivan* was raised by petitioner but ignored by the Seventh Circuit. *De novo* review does not give the Seventh Circuit

the discretion to skip legal analysis concerning the relevant precedents of qualified immunity and Fourth Amendment seizure. Further, the Seventh Circuit's opinion raises the issue of waiver but fails to acknowledge that it reviewed the appeal *de novo* and went outside the record and construed the case in light most favorable to the defendants.

The Contextual Setting of the Case Proves that Mr. Schlessinger was not Disorderly

The District Court did not even mention the possibility of disorderly conduct being reasonable. Respondents have advocated the Seventh Circuit's view that the mere fact that Mr. Schlessinger's affidavit in opposition to the summary judgment did not explicitly state that he was not "disorderly" proves disorderly conduct and makes it appropriate for the Seventh Circuit to avoid going through the qualified immunity analysis. This is flawed reasoning because the federal court system has never required affiants to specifically negate the exact wording of the opposing parties' affidavits and say, "Affiant was *not* 'disorderly.' Affiant was *not* 'obnoxious.' " Mr. Schlessinger's affidavit that demonstrates through the context that Mr. Schlessinger was not disorderly is perfectly acceptable. The contextual setting and case facts as found in the Summary Judgment also show that Mr. Schlessinger was not disorderly.

Respondents cannot explain away how Officer Salimes' threat of arrest in order to have Mr. Schlessinger pay for the food is reasonable basis for arresting for disorderly conduct. Mr. Schlessinger did not violate a

law. Payment for food that he did not eat is *not* an element of disorderly conduct. Officer Salimes did *not* tell Mr. Schlessinger to leave the premises or be arrested for disorderly conduct. Mr. Schlessinger was *not* free to leave the premises until he paid the food bill. If disorderly conduct was really at issue in this case, Mr. Schlessinger would have been free to leave the premises without paying the food bill. When the facts are looked at carefully, it is clear that the point of Officer Salimes's threat of arrest and handcuffing was to get Mr. Schlessinger to pay the food bill and not about disorderly conduct at all.

Facts in the Case do not Support Fraud on the Innkeeper Statute, Wis. Stat. § 943.21

Respondents have completely confused the policy and elements of the Fraud on the Innkeeper statute, Wis. Stat. § 943.21. Under this statute, the actor *must* abscond without paying for the food. Respondents have argued that the words, "absconding" and "clandestinely" have nothing to do with *secrecy* or *hiding* away. The word "abscond" is specifically used in this statute to describe the type of secretive behavior this statute was designed to address. The facts of this case demonstrate that Mr. Schlessinger did *not intentionally abscond*. The Fraud on the Innkeeper statute further requires an "intent to defraud." Mr. Schlessinger was willing to pay for his dinner when he got his proper order. Mr. Schlessinger was never given his proper order. The facts of this case do not support fraud. Respondents attempt to stretch this statute out to include *anything* in which the innkeeper does not like or "consent." This interpretation is over

broad. The plain meaning of the statute *requires* "absconding," which clearly did not happen. The Fraud on the Innkeeper statute does not apply because *none* of its required elements are met. Further, Officer Salimes threatened an arrest based upon disorderly conduct and *theft*, not fraud on the innkeeper.

Qualified Immunity Appeal had Merit because the District Court Ruled that Officer Salimes had Seized Mr. Schlessinger Within the Meaning of the Fourth Amendment

This case is *not* a sanctionable case. Respondents expended a great deal of their response to the citing of a large set of cases describing in detail the meaning of the words "frivolous" and "sanction." However, sanctioning is governed by the *facts of the case*. Nothing that respondents say to bypass this specific statement of seizure dents the fact that it was the District Court's position (and not just the petitioner's position) that Officer Salimes had seized Mr. Schlessinger within the meaning of the Fourth Amendment.

Respondents imply that the decision of the District Court should play no part in the issue of sanctioning. It is necessary for this Court to consider the District Court's legal analysis because it is that position upon which the appeal was based. The sanctioning issue concerning whether the filing of the appeal was frivolous *must* be addressed *at the point in time at which the decision to appeal was made*: the point in time which begins directly after the District Court's decision and ends directly at the point of filing the appeal. Clearly, this case is not sanctionable because this qualified immunity appeal was based on the

fact that the District Court specifically found that Mr. Schlessinger was seized within the meaning of the Fourth Amendment.

Petitioner questions the integrity of respondents asking for sanctions and double costs concerning this Petition when respondents are acutely aware that the District Court specifically found that Officer Salimes had seized Mr. Schlessinger under the meaning of the Fourth Amendment. There has never been an integrity question about the District Court and its legal analysis and conclusions, which clearly show the merits of this case.

The Supreme Court Defined the Legal Term "Embroilment" and Use of "Embroilment" is not a Personal Attack on the Seventh Circuit

The Court of Appeals decision contains comments and words that make the appeal decision biased and partial on the fact of the opinion. The word "embroilment" is the correct legal terminology to use for the issue of bias and partiality that is being addressed. It is a legitimate due process concern based on Supreme Court case law as well as Seventh Circuit case law.

Respondents have stated to this Court that petitioner's claim of embroilment is "inaccurate," basing this statement primarily upon respondents' assertion that embroilment can only be used for negative bias in the presence of the jury during a murder trial. Respondents did not acknowledge the *other* embroilment case cited in the Petition, *Bakalis v. Golembeski*, 35 F.3d 318, 323 (7th Cir. 1994). *Bakalis* involved a qualified immunity civil dispute concerning the issue of whether the record reflected a

"running controversy" between the college board of trustees as adjudicators and plaintiff whose employment was terminated. *Bakalis v. Golembeski* demonstrates that the issue of embroilment is an issue that is to be applied to all types of cases, both criminal and civil, in which there is a record that reflects bias and partiality. Embroilment is a claim which appropriately applies to this case.

Due Process Requires More Than the Mere Technicalities of Notice and Chance to Respond

Respondents have asserted that there is no Constitutional due process violation simply because the Seventh Circuit gave notice of its plan to award sanctions and gave an opportunity for petitioner to respond. Petitioner agrees that notice of the plan to sanction was given and that petitioner was given a chance to respond. However, because of the tone, words, comments, the lack of legal analysis concerning qualified immunity and Fourth Amendment seizure, and the failure of the Court of Appeals to view the facts in the light most favorable to petitioner in the Court of Appeals decision, and the omissions, changes, and diminishments of important facts, petitioner felt that the chance to be *meaningfully heard* concerning the sanctioning was futile and viewed the chance to respond as a formality so that petitioner would not be accused of waiving rights of due process.

Due process requires more than mere technicalities of allowing a chance to respond, as respondents suggest. There must be the opportunity to be "meaningfully heard" by judges who have not already made up their minds. The strong tone, words, and comments concerning

the case being frivolous and sanctionable, including the comments "frivolous at the outset," "goofy lawsuit," "contentention is nutty," "loopy thesis," "Schlessinger's lawyer (yes, he has one)," of the Seventh Circuit's opinion gave the judges no option but to sanction or openly disregard a large portion of their opinion concerning sanctioning and frivolous appeal. Thus, the chance to respond was a mere formality and not the due process guaranteed by the Constitution.

Further, there is very limited due process given concerning the issue of sanctioning. The only impartial due process procedure left, after the judges who have already set the case in stone as being "frivolous at the outset" in the opinion, is the chance of being heard in a discretionary appeal, the Writ of Certiorari, to the Supreme Court. Because of the limited amount of due process given concerning the issue of sanctioning, petitioner has very legitimate due process concerns about responding to a sanction notice concerning thousands of dollars before judges with immovable views.

Why the Supreme Court Should Grant This Petition

The Seventh Circuit published its opinion of this case which gives police officers permission to arrest consumers of restaurants, hotels, grocery stores, department stores, as well as all other types of stores, shops, and services if the consumers are not willing to pay for subquality goods or services. A consumer dispute has never been a misdemeanor or crime. A consumer dispute has always been a civil dispute in which the parties are allowed to bring their arguments to civil court. Allowing

police officers to threaten arrest and handcuff consumers is fundamentally wrong and chills consumers' equitable rights to pay a fair and just price for a quality product or service. The Supreme Court must not allow the Seventh Circuit's opinion to take precedence over common sense and grant police officers this unwarranted and uncontrolled power.

The sanctioning issue of this case is also an extremely important and timely issue for the Supreme Court to address. The Supreme Court needs to address to all judges the specific requirements of legal analysis and due process when using the power to sanction. These requirements should at minimum include the following: 1) the appearance of impartiality of the tribunal in written communications and opinions; 2) a detailed legal analysis applying case facts to all relevant case law which clearly and unequivocally demonstrates the claim's meritless or frivolous nature; and 3) recognition and deference given to a District Court's legal analysis and decision that supports the claim's meritorious nature. These requirements would help differentiate between sanctionable claims and the claims of merit or the parties or legal counsel for which the tribunal has adverse feelings.

The Supreme Court should also grant this Writ of Certiorari to directly deal with abuse of sanctioning. Abuse of sanctioning, especially when publicly recognized but not corrected in any way, deeply cuts away at the integrity of the entire Federal judicial system. The *ABA Journal* in April, 1997 edition, the article, "Paper Trailblazer," by Alexander Wohl, cited a 1994 Chicago Council of Lawyers study of the Seventh Circuit which

criticized a Seventh Circuit judge for being condescending and demeaning to lawyers, giving "short shrift to the facts," and for an abuse of sanctions of attorneys (page 72). Petitioner's claims in this petition, while filed before the printing of this article, include the same claims as found in this study. While the Chicago Counsel of Lawyers can study and find abuse of sanctioning and the *ABA Journal* can nationally report about abuse of sanctioning, only the Supreme Court has the power to create case law that directly tells judges that, "No! Abuse of sanctioning is not tolerated in the United States Judiciary."

Respectfully submitted,

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